NO. NHH-CV19-5003875	:	SUPERIOR COURT/
	:	HOUSING SESSION
NYRIEL SMITH, et al.,	:	J.D OF NEW HAVEN
Plaintiffs	:	
v.	:	
CITY OF NEW HAVEN, et al.,	:	
Defendants	:	JUNE 13, 2019

DEFENDANTS' BRIEF IN OPPOSITION
TO PRELIMINARY INJUNCTION

INTRODUCTION

Injunctions are always an extraordinary remedy, and this case presents a confluence of factors that dictate the greatest degree of caution before an injunction is granted. These factors are that plaintiffs have requested: (1) injunctive relief that is *mandatory* rather than temporary; (2) an injunction against a local government; and (3) an injunction that would affect the rights of private individuals, companies and a quasi-governmental agency that are not yet parties to this case. Under established Connecticut law, any one of those factors increases a party's burden of obtaining a temporary injunction; with all co-existing, and in light of the weak proof put forward by plaintiffs at the hearing of June 7, 2109, the Court should not take this extraordinary step.

As stated by their counsel (despite the apparently greater breadth of their Complaint), plaintiffs specifically seek an injunction requiring two things -- that defendants: (1) schedule immediate comprehensive inspections of residences inhabited by children under 6 whose blood levels are 5 or more micrograms per deciliter of whole blood, followed by other measures such as orders of abatement if lead hazards are found; and (2) include particular information about federal law in their notifications to the families of such children. Both sides agree that the first of

those two requests is the primary question in this proceeding. From plaintiffs' point of view, the City of New Haven's definition of "lead poisoning" means what they say it means, despite unclear language and lack of any objective support for their reading of it. From their point of view, the fact that the two named plaintiffs have blood-lead levels greater than 5 μg/dl means this Court should order the City of New Haven, contrary to the City's own understanding and interpretation of the ordinance it enacted, to undertake an immediate, sweeping and likely counterproductive (because it would divert resources to children with lower lead levels) program of home inspections and abatements and even, in plaintiffs' idea, relocations.

The meaning of the City's ordinance will be discussed further below, in the context of plaintiffs' burden to demonstrate they are "likely to prevail on the merits," *see infra* at 23-36. Also discussed will be the evidence presented at the hearing of June 7, 2019, as to plaintiffs' failure to meet their burden of proof. In ruling on plaintiffs' application, this Court should keep foremost in mind that exercises of the municipal police powers, including the regulation of health and safety, are accorded a very high degree of judicial deference, as innumerable court rulings have made clear. The City of New Haven is interpreting its ordinance reasonably and logically and, by way of practices that are adjusted over time, it has the right to enforce its own ordinances in the way it sees fit to protect the public safety and the welfare of its inhabitants. As set forth below, for many interrelated reasons, plaintiffs have failed to meet their burden of proof as to their application for a temporary injunction, and the issuance of such an injunction would be inappropriate under the governing principles of law.

ARGUMENT

I. A MANDATORY INJUNCTION AGAINST THE CITY, PARTICULARLY WHERE INTERESTED PERSONS HAVE NOT BEEN MADE PARTIES, WOULD BE INCONSISTENT WITH CONNECTICUT LAW

A. *An Injunction Constitutes Extraordinary Relief*

In order to obtain injunctive relief, a party must demonstrate four things, namely that: (1) it has no adequate remedy at law; (2) it will suffer irreparable harm without an injunction; (3) it will likely prevail on the merits; and (4) the balance of equities tips in its favor. *E.g., Waterbury Teachers Assn. v. Freedom of Information Commission*, 230 Conn. 441, 446 (1994). "The plaintiff seeking injunctive relief bears the burden of proving facts which will establish irreparable harm as a result of that violation." *Karls v. Alexandra Realty Corp.,* 179 Conn. 390, 401 (1980). The issuance of a temporary injunction is an "extraordinary remedy" that "courts should grant cautiously." *Hartford v. American Arbitration Assn.,* 174 Conn. 472, 476 (1978). "The remedy by injunction is summary, peculiar and extraordinary. An injunction ought not to be issued except for the prevention of great and irreparable mischief." *Connecticut Assn. of Clinical Laboratories v. Connecticut Blue Cross*, 31 Conn. Supp. 110, 113 (1973). "The power of courts to issue preliminary injunctions should be exercised with the utmost care and great deliberation . . . Generally, a temporary injunction will not issue unless the evidence is clear and no substantial doubt exists as to the plaintiff's right to it." *Bruno v. BBC Corp.,* 2002 WL 230818 at *3 (Jan. 23, 2002) (Exhibit 1).

i. *Plaintiffs are Requesting A Mandatory Injunction*

The purpose of a temporary injunction is to maintain the status quo until the rights of the various parties can be sorted out, after a hearing on the merits. *Clinton v. Middlesex Assurance Co.,* 37 Conn. App. 269, 270 (1995). The *temporary* injunction is a preliminary order, granted at

the outset or during the pendency of an action, *forbidding the performance of matters such as a threatened act* until the rights of the parties can be finally determined by the court. *Deming v. Broadstreet*, 85 Conn. 650, 659 (1912) (emphasis added).

This is not what plaintiffs are requesting here. They are seeking a *mandatory* injunction, which is a "special type of relief" consisting of "a court order commanding a party to perform an act." *Renaissance Mgmt. Co. v. Connecticut Hous. Fin. Auth.*, 281 Conn. 227, 230 (2007); *Olcott v. Pendleton*, 128 Conn. 292, 295 (Conn. 1941). Any order "requiring the performance of an act is, by definition, a mandatory injunction." *Tomasso Bros, Inc. v. October Twenty-Four, Inc.*, 230 Conn. 641, 654 (1994). Mandatory injunctions therefore require an elevated burden of proof. *See id.* at 656; *accord, Davenport v. Society of Cincinnati in State of Connecticut*, 46 Conn. Supp. 411, 428 (1999) (when seeking mandatory injunction, "plaintiff's burden is greater" than as to ordinary temporary injunction). A plaintiff "bears a heavy burden in showing that a mandatory injunction should be granted . . . . because mandatory injunctions are . . . disfavored as a harsh remedy." *Renaissance Mgmt. Co.*, 281 Conn. 230-31. A mandatory injunction "is an extraordinary remedy and should only be granted under compelling circumstances." *Herbert v. Smyth*, 155 Conn. 78, 85 (1967). In fact, mandatory injunctions are considered so rare that they "will only be issued in extraordinary cases . . . where the failure to issue it will cause unusual hardship, *and only then where it appears the plaintiff is clearly entitled to a permanent injunction to a like effect.*" *Mele v. High Standard Mfg. Co.*, 13 Conn. Supp. 47, 50-51 (1994) (emphasis added); *see also HHC Mgmt., LLC v. City of Waterbury*, 2015 WL 671604 at *3 (Waterbury Jan. 30, 2015) (Exhibit 2) (refusing to issue mandatory injunction against defendant city and noting that such relief is "both disfavored and extraordinary"); *Meta Life Inc. v. Town of*

Hamden, 2010 WL 2817488 at *13 (New Haven June 7, 2010) (Exhibit 3) (mandatory injunction against city would be appropriate only in "the rarest circumstances").

In this case, the Complaint asks the Court to order defendants, by way of injunction, to take affirmative action in a variety of ways – defendants should be ordered to "conduct an immediate lead hazards inspection," "determine all sources of lead," "send an abatement order" to property owners, and "ensure that abatement is completed . . . including taking over the abatement and relocating the child." These requests demand positive actions, and since the nature of plaintiffs' Complaint is that the city has not and is not currently doing these acts, the requested injunction by definition would exceed maintenance of the status quo. Plaintiffs therefore face an elevated level of proof, even for injunction cases.

Importantly, as noted in passing above, Connecticut decisions also have pointed out that a mandatory injunction is also disfavored because its effect is comparable to a permanent injunction. In *Bloomfield Early Learning Ctr., Inc. v. Town of Bloomfield*, 2011 WL 6945301 (Hartford Nov. 25, 2011) (Exhibit 4), the court stated that where plaintiff seeks a mandatory injunction, it must meet a higher burden of proof "by showing 'clearly' that he is entitled to relief or that 'extreme or very serious damages' will result from a denial of the injunction ... This heightened showing is also required where the issuance of the injunction would provide the movant with substantially all the relief he or she seeks and where the relief could not be undone, even if the non-moving party later prevails at trial." *Id.* at 2; *accord*, C*ity of Norwalk v. Maraglino*, 2016 WL 8115535 at *6 (Stamford Oct. 17, 2016) (Exhibit 5) (denying mandatory injunction because court was "reluctant to enter an order on a motion for temporary injunction that is tantamount to the ultimate relief that [plaintiff] seeks, particularly where the pleadings are

not yet closed"); *Davenport v. Society of Cincinnati in State of Connecticut*, 46 Conn. Supp. 411 (1999) (where mandatory injunction is sought, moving party must show "clearly" that he or she is entitled to relief or that "extreme or very serious damage" result from denial); *Cohen v. Norwalk, Second Taxing Dist.*, 2005 WL 2496917 (Stamford Sept. 13, 2005) (Exhibit 6) (same); *Kent Literary Club of Wesleyan University v. Whaley*, 2004 WL 2361686 (Middlesex Sept. 16, 2004) (Exhibit 7) (same). In fact, plaintiffs in this case appeared to disclaim any request for a permanent injunction at the close of the June 7 hearing, *Hearing Tr.* (Exhibit 8) at 295 (statement by Attorney Marx to Court that "we don't think there's any need for any permanent injunctive phase now"), and since a mandatory injunction is effectively a permanent injunction, they are not entitled to such relief in this case.

ii. *Plaintiffs Are Seeking to Enjoin A City and its Officials, Despite the Deference Accorded Them In Interpreting and Enforcing their Own Laws*

As with mandatory injunctions, courts exercise their injunctive power even more cautiously when the party to be restrained is a governmental agency; obviously this applies to this case, where the four defendants are the City of New Haven, its mayor, and two officials of its Health Department in their official capacities. Connecticut courts have consistently emphasized this point. In *Commission of Health Servs. v. Reynolds*, 1990 WL 261993 (Conn. Super. Nov. 6, 1990) (Exhibit 9), the State's health commission sought to enjoin a town and its tax collector from proceeding with a tax foreclosure sale of two lots. Plaintiffs alleged that the land met certain conditions relating to water supply that require the town to sell the land only to a water company and only with permission. Emphasizing that "courts must act with extreme caution where the granting of an injunction will hamper the operations of government," along with the need to respect the town's revenue process (and the lack of proof that the water supply

faced imminent harm), the court denied the injunction. *Id.* at *1. Another decision in which the court emphasized this concern is *Riggione v. Town of Orange*, 2001 WL 497101 (Conn. Super. Apr. 19, 2001) (Exhibit 10). In that case, plaintiffs were five residents seeking to enjoin a town's road construction project, which was about to begin on their street. The plaintiffs alleged that the project violated State statutes because the town had failed to obtain approval from the town's planning commission. Given the ambiguity in the statute, the court denied the injunction, holding that the plaintiffs had not met their burden of establishing that the town had violated state law. As the court stated, it "must exercise even greater caution when enjoining the action of a government official or agency. Courts will act with extreme caution when the granting of injunctive relief will result in interference with or embarrassment to the operations of government." *Id.* at 11.

Another trial court pointed out that it would be inappropriate to issue injunctive relief where it would "abrogate[] city ordinances" by imposing mandatory actions on a city agency. *Cheryl Terry Enterprises, LTD v. City of Hartford*, 2003 WL 21384192 (Super. Ct. June 4, 2003) (Exhibit 11), *aff'd sub nom., Cheryl Terry Enterprises, Ltd. v. City of Hartford,* 270 Conn. 619, 854 A.2d 1066 (2004). In that case, the plaintiff was a bus company that alleged the city had improperly awarded a school transportation contract to someone else; plaintiff sought a mandatory injunction ordering the city to enter a new contract with plaintiff. The court held that mandatory injunctions were not appropriate to remedy wrongs already perpetrated and declined to issue the injunction, because doing so would interfere with the city's operation of its municipal bidding statutes and its bus transportation operation already in place. *Id.* at *5. Similarly, in *Housing Auth. of City of New Haven v. Peraro*, 40 Conn. Supp. 365 (Super. Ct.

1985), *aff'd,* 199 Conn. 566, 509 A.2d 474 (1986), the court denied a motion to enjoin a government agency, stating that it "seeks radical surgery upon an agency of state government" and that granting the injunction would constitute "exceptional relief which would amount to judicial lawmaking." *Id.* at 372-73. In that case, plaintiff sought to enjoin the state board of mediation and arbitration from arbitrating a grievance between a union and the housing authority, alleging that the board failed to follow its regulations in establishing new procedures and colluded with the union to advance the union's interests over that of the housing authority. The court found that the board's change in procedures was an attempt to deal with a crisis in their fiscal and other resources, by prioritizing cases to be heard by importance, to ensure that it could hear as many cases as possible from its backlog and still function. Warning against "undue interference with governmental functions," the court found that plaintiffs failed to prove irreparable injury or lack of adequate remedy at law in denying the injunction that would have "cause[d] . . . upset to the processes of government."

As these cases demonstrate clearly, "Courts will act with extreme caution where the granting of injunctive relief will result in embarrassment to the operations of government." *Coombs v. Larson*, 112 Conn. 236 (1930). "When municipal authorities are acting within the limits of the formal powers conferred upon them and in due form of law, the right of the courts to supervise, review or restrain them is necessarily exceedingly limited." *McAdam v. Sheldon*, 153 Conn. 278, 281 (1965). As the Connecticut Supreme Court noted in *McAdam,* this stems in part from "the constitutional separation of the legislative, executive and judicial functions and powers." And as that Court stated in another case, "Whether present conditions require the degree of regulation imposed by [a city ordinance] is a matter for the judgment of the legislative

body of the city. Courts can interfere only in those extreme cases where the action taken is unreasonable, discriminatory or arbitrary." *Connecticut Theatrical Corp. v. City of New Britain*, 147 Conn. 546, 552 (1960). "Courts will not substitute their judgment for the legislative judgment when these considerations are fairly debatable." *State v. Hillman*, 110 Conn. 92 (1929). "[T]he scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." *Id.* "The limit of the exercise of the police power is necessarily flexible." *Clark v. Town Council of Town of W. Hartford*, 145 Conn. 476, 482–83 (1958). "It has to be considered in the light of the times and the prevailing conditions." *State v. Gordon,* 143 Conn. 698, 703 (1956). "The day-to-day decision-making regarding when and how to direct town resources in furtherance of [municipal regulatory duties] necessarily is left to the judgment and discretion of [local] officials and employees." *Northrup v. Witkowski*, 175 Conn. App. 223, 237 (2017).

And this discretion includes the City's right to make decisions as to how it can and should allocate its financial resources in enforcement of the law. The Connecticut Supreme Court held in *McAdam* that the plaintiffs were not entitled to enjoin the town from acquiring land for and beginning plans to build for a new school. As the Court stated, "The municipality has the power to decide how *economically* it will perform its governmental duties" (emphasis added). *Id.* at 284. And in *Cohen v. City of Hartford*, 244 Conn. 206 (1998), the Connecticut Supreme Court also declined to grant the plaintiff's request for an injunction against a city, in relation to the closing of a road for pedestrian use. The Court held that municipalities' powers and responsibilities of public welfare encompassed broad factors: "The concept of the public welfare is broad and inclusive.... The values it represents are ... physical [and] aesthetic as well

as *monetary*." *Id.* at 218 (emphasis added). Monetary considerations are part of municipalities' police powers, as are regulations "in the interest of the public heath, safety, or welfare." *Id*

iii. *Plaintiff Are Seeking an Injunction that Would Affect the Rights of Nonparties*

Another reason why this Court must apply extreme caution before deciding to grant an injunction in this case is that an injunction constitutes equitable relief, and equity cannot act where parties to be affected are not before the court or have not been given the opportunity to be heard. *Connecticut Employees Union "Independent," Inc. v. Connecticut State Employees Ass'n, Inc.*, 183 Conn. 235, 248 (1981). In this case, the evidence and law both made it clear that two sets of entities have not yet been made defendants, although they clearly will be – owners of the plaintiffs' properties and the Elm City Housing Authority. Under the legislative scheme on which plaintiffs relies, owners are the entities that are primarily responsible for abatement of premises where toxic levels of lead paint are found in a dwelling unit where a child under the age of six resides, and abatement is a component of the injunctive relief plaintiffs are requesting. *See* Application for Temporary Injunction. If the Court grants an injunction, that injunction would entail requiring the City of New Haven to order property owners to undertake lengthy, expensive, and difficult abatement, and yet not a single owner, not even the two owners of the properties where the named plaintiffs live, is here to assert its interests. Meanwhile, as the evidence clearly showed, the Elm City Housing Authority – not the City – is the legally responsible party for scheduling comprehensive lead inspections at any federally subsidized housing in accordance with the HUD Lead Safe Housing Rule requirements, including Section 8 housing, and those inspections are required at a much lower level of blood lead concentration than under State law (in its definition of Elevated Blood Lead Level) or City ordinance (in its

definition of "lead poisoning"). Plaintiffs called a brief witness to discuss Elm City Housing, but that entity is not yet a party to this proceeding. This means that if the Court issues injunctive relief, it will either be enjoining Elm City Housing without that party even having an opportunity to be heard, or inappropriately placing responsibility for all of those comprehensive inspections on the City, contrary to the State Department of Health's assurance to local health departments that such inspections are not their responsibility under the law.

This is not an issue of defendants "asserting the rights" of non-parties; this is a precept of Connecticut law. The presence of a missing party may be "absolutely required" in a given action where that party has an interest that would be affected by the relief sought. *See Graham v. Zimmerman,* 181 Conn. 367, 372 (1980) ("Anyone having a present interest in the property in question is a necessary party to [a foreclosure action] . . . because he or she holds a known interest in the land which would be affected by the relief sought"). As the Appellate Court stated in *Glasson v. Portland*, 6 Conn. App. 229, 236 (1986), "It is the settled rule of this jurisdiction, if indeed it may not be safely called an established principle of general jurisprudence, that no court will proceed to the adjudication of a matter involving conflicting rights and interests, until all persons directly concerned in the event have been actually or constructively notified of the pendency of the proceeding, and given reasonable opportunity to appear and be heard." And in *Cheryl Terry Enters. v. City of Harford*, 2001 WL 236882 at *5 (Super. Ct. Feb. 22, 2001) (Exhibit 12), the court held that in order to satisfy "elemental fairness, if not due process" a necessary party "should be joined before any hearing on the injunction proceeds." In that case, the court looked to see if the party "would have a right to intervene" and applied a test articulated in *Horton v. Meskill*, 187 Conn. 187, 195 (1982) ("where the applicant's interest is of such a

direct and immediate character, that the applicant will either gain or lose by the direct legal operation and effect of the judgment"). The owners of the properties at issue and the Elm City Housing Authority would clearly have a right to intervene in this lawsuit. Their rights would be affected or even determined by an injunction, and this is yet another reason why the Court should not issue an injunction in this case.

II. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF PROOF AS TO A VIOLATION OF NEW HAVEN MUNICIPAL ORDINANCES

Of course, the fundamental reason why no injunction should issue here is that plaintiffs have failed to meet their burden of proof. The standard for issuance of a temporary injunction, which should be applied with unusual strictness as described above, requires plaintiffs to carry a specific burden of proof. Plaintiffs must demonstrate that: (1) they have no adequate remedy at law; (2) they will suffer irreparable harm without an injunction; (3) they will likely prevail on the merits; *and* (4) that the balance of equities tips in their favor. *E.g., Waterbury Teachers Assn. v. Freedom of Information Commission*, 230 Conn. 441, 446 (1994). The hearing of June 7 made it clear that plaintiffs have not met these four requirements. Among many other points discussed below, the father of one named plaintiff testified that his daughter's doctors, when they found that her blood lead level was 5 μg/dl, informed him that she was "good" because her blood lead level was "low." *Hearing Tr.* at 84. It is not clear how plaintiffs can argue that a level of 5 μg/dl constitutes irreparable harm, and requires mandatory injunctive relief against the City, when one of the named plaintiff's own physicians expresses that view.

A. *Plaintiffs Have Not Shown They Lack An Adequate Remedy At Law*

Plaintiffs have not demonstrated by admissible evidence that they lack an adequate remedy at law. "Adequate remedy at law means a remedy vested in the complainant, to which he

may, at all times, resort, at his own option, fully and freely, without let or hindrance . . . " *Stocker v. Waterbury*, 154 Conn. 446, 449 (1967). In fact, plaintiffs have all the remedies available to all Connecticut residents under a comprehensive set of state and municipal statutes governing lead-paint in housing. For example, if one of the plaintiffs would be tested and show a blood-lead level of 20 µg/dl (or two results of 15 µg/dl within three months), the City of New Haven's Health Department will issue an order of inspection, and abatement will proceed if there is toxic lead paint. These remedies result from lawmaking by the State of Connecticut and the City itself, and plaintiffs have not shown that those laws are inadequate to serve their purposes.

B. *Plaintiffs Have Not Shown That They Will Suffer Irreparable Harm Without a Temporary Injunction*

Plaintiffs have not demonstrated by admissible evidence that they will suffer irreparable harm if an injunction does not issue. A finding of irreparable harm means: (1) a substantial probability that the alleged harm will result; and (2) that such harm will be irreparable. *International Assn. of Firefighters, Local 786 v. Serrani,* 26 Conn. App. 610, 616 (1992).

1. *Plaintiffs Have Not Met Their Burden of Showing Irreparable Harm*

a. Neither the Parents nor Dr. Rosenthal Established Irreparable Harm, and the State Legislative Scheme Shows That Irreparable Harm Does Not Occur at 5 µg/dl

The two named plaintiffs have not presented evidence that they will suffer irreparable harm without an injunction. The evidence presented for Nyriel Smith shows blood lead levels between July 23, 2018 and February 8, 2019 as follows, in µg/dl: 8, 6, 11, 9, and 11. Plaintiff's Ex. 17. (Her first level of 8 was capillary blood level, and not venous. Plaintiff's Ex. 20.) In other words, Nyriel's blood level went down and then slightly up again during this period, and it never even approached the State's defined "Elevated Blood Lead Level" ("EBLL") of 20 µg/dl or the

City's definition of lead poisoning. *See Hearing Tr.* at 226 (testimony of S. Drummond). Meanwhile, the evidence presented for Sarah Muhawenimana shows blood lead levels for the period of February 9, 2017 through April 12, 2019 of (in μg/dl) 4, 10, 8, 8, 10, 9, 10, and 10. Plaintiff's Ex. 18. (Of those results, the second is capillary rather than venous.) In other words, over a period of about 1½ years, Sarah's blood lead level has moved upwards only from 8 μg/dl to 10 μg/dl.

Defendants recognize, of course, that any level of lead in a child's blood presents concern, but these levels cannot possibly meet plaintiffs' burden of showing irreparable harm. Nichelle Hobby, the mother of Nyriel Smith, testified that her daughter will be three years old in a week. *Hearing Tr.* at 29. Ms. Hobby testified that when doctors first informed her that Nyriel had a blood level of 11 μg/dl, in April 2018, "they just told me that they needed to wait to do more tests." *Id.* at 32. Clearly, those doctors did not see irreparable harm at that level, based on Ms. Hobby's testimony. Ms. Hobby then went to the lead clinic, where Nyriel was seen by a Dr. Carl Baum, and during a period of months, the representative of that clinic came to her house. *Id.* at 32-34. During that time, Nyriel was under Dr. Baum's care and continued to be tested for lead. *Id.* at 34. Ms. Hobby testified that she had seen "some delay in [Nyriel's] speech, which I have found to be recent." But she also testified that Nyriel's blood level had gone back down before it went up. *Id.* at 47.

Rukara Rugereza, the father of the plaintiff known as "Sara," also testified. *He testified that although his daughter Sophia (a child of 1½ who is not a plaintiff in this case,* Hearing Tr. at 56) *has had blood lead levels of 5, her doctors have informed the family that she is "good" because her "blood level is low." Id.* at 84-85 (emphasis added). As to Sara, Mr. Rugereza

testified that he and his wife have four children, ages six, four (Sara), three and one. *Id.* at 55-56. Mr. Rugereza then testified that he found out about Sara having lead in her blood in February of this year, only about three months ago. *Id.* at 62-63. He identified photos of their residence, which included a bicycle in the children's play area. *Id.* at 72. He said that Sara is not doing well because she is "not eating at home" and that her speech was "not improving." *Id.* at 73-75. He admitted, however, that "maybe Sara is eating a lot at school," because "Coming at home she feel like she -- she's good." *Id.* at 78. (Sara goes to school every day. *Id.*) He admitted, in fact, that good meals at school may be the reason Sara is not eating well at home. *Id.* at 79. He did not know if Sara is being tested for special education services. *Id.* at 75. He also admitted that his other three young children (who live in the same residence and range in age from one to six) are not plaintiffs in this case. *Id.* at 80-81.[1] This testimony from the parents of the two named plaintiffs fails to provide any support for plaintiffs' assertion of irreparable harm.

Nor did the testimony of plaintiffs' expert, Marjorie Rosenthal, M.D., establish irreparable harm to these children. Dr. Rosenthal agreed that the blood lead level of both plaintiffs went down and up over the period of time tested, and that it also had remained the same over certain tests. *Hearing Tr.* at 139-40; Plaintiffs' Hearing Exs. 17 & 18. She said that her clinic interprets a blood lead level of 5 μg/dl as simply an "alert" to inform the child's family that they should follow up with the lead clinic; at that point, "we want to educate them on the safest way to have a safe home for their children, and to also follow up with us in terms of development, behavior and development, because those can both be problems with lead levels that are concerning." *Id.* at 106-07. Although Dr. Rosenthal did testify that if a child has a blood

[1] Mr. Rugereza also admitted (contrary to the allegations in the Complaint) that he could read materials from the Health Department in English. *Id.* at 78.

lead level of 5 μg/dl or greater, "I would like that child removed in days to weeks," *id.* at 108, her personal wishes as a doctor cannot establish that irreparable harm will result if the child is not removed. In fact, contrary to Dr. Rosenthal's wishes for her patients, Sherine Drummond of the State of Connecticut Department of Public Health testified that it is "typical" for children with EBLLs (defined by the State as 20 μg/dl or above, or two tests of 15 μg/dl within 90 days) to remain in their homes, because "interim control measures" can be taken to prevent the child's blood lead level from increasing until the abatement can be conducted. *Id.* at 228-29. As Ms. Drummond explained, those measures include re-arranging furniture to prevent the child from having access to defective windows, advising family members to remove their shoes, cleaning, and placing contact paper on areas with chipping paint. *Id.* at 230. In some instances, the local health department decides that the child should be removed from the home because the premises are "grossly defective," a decision within the discretion of the local health department. *Id.* at 229. However, the *only requirement* that a child be relocated from the home occurs where a child has a confirmed venous blood lead level of *45ug/dl* and has undergone chelation (removing blood from the body). *Id.* at 231. And Ms. Drummond testified that she regularly uses CDC materials as a reference in her job. *Id.* at 233. That is an important point, given plaintiffs' misguided assertion that all children with lead levels above 5 μg/dl have "lead poisoning" -- ostensibly because the CDC says so, which is not true; if the CDC said so, then the State of Connecticut would be ignoring untold numbers of children with lead poisoning as well. In fact, as demonstrated by Defendants' Hearing Ex. D, and the materials incorporated by plaintiffs in their Complaint at paragraph 54, the CDC makes it quite clear that the level of 5 μg/dl is simply a

"reference level," which prior to 2012 was simply called a "level of concern."[2] After all, the State of Connecticut reminds local health departments such as the City of New Haven's that "lead poisoning" under state law means an EBLL of 20 μg/dl or two 15 μg/dl tests within 90 days, Defendants' Hearing Ex. E at 1. Moreover, the State requires only that clinical laboratories "must report blood lead levels of equal to or greater than 10 μg/dl of blood" under Conn. Gen. Stat. 19a-110, and local health departments only need to conduct epidemiological investigation at a level of 20 μg/dl. *Id.* These are only some examples of how the legislative and regulatory schemes defeat any argument of irreparable harm in this case. In other words, if the testimony of Dr. Rosenthal established that children with blood lead levels of 5 μg/dl or greater will suffer irreparable harm if they are not removed from their homes within days or weeks, as she personally would like, then the State of Connecticut is subjecting countless children, throughout the state, to irreparable harm.[3]

A Connecticut Superior Court addressed this issue in *Kowalczyk v. Cleveland,* 2011 WL 6934561 (New Britain, Dec. 5, 2011) (Exhibit 13). In that case, the plaintiff (a minor child) and his mother alleged that the Torrington Area Health District had failed to protect the child from exposure to toxic levels of lead paint in his family's rental residence. *Id.* at *1. According to the

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[2] *See* https://www.cdc.gov/nceh/lead/data/definitions.htm, cited at paragraph 54 of Complaint.

[3] Defendants reiterate *infra* that Dr. Rosenthal should not have been allowed to testify as an expert because plaintiffs deliberately failed to provide "fair notice" of that testimony under the Practice Book. Even if the Court allows the testimony of Dr. Rosenthal, that testimony merits little if any weight because she described her own expertise as "primary care pediatrics." *Hearing Tr.* at 95. Although the Court allowed Dr. Rosenthal to testify as an expert on issues related to lead, her testimony made it clear that she is not an expert on the definitions of "lead poisoning" or "any other abnormal body burdens of lead," and her views on what that latter term means, either to her, or to the CDC, or to this Court, should be given no weight. Moreover, Dr. Rosenthal was not credible. From the first moment of cross-examination, she demonstrated unusual combativeness and even sarcasm in response to straightforward questions. She looked to plaintiffs' counsel for direction until reminded not to do so. *See Hearing Tr.* at 94. Dr. Rosenthal understandably cares about the health of her clinic's patients, and she was willing to say whatever it took to force defendants to take the measures she thinks the law requires – or what she thinks the law *should* require.

evidence, the minor child, who was one year old, had been tested at a level of *27 μg/dl* (nearly three times the levels of the plaintiffs in this case). *Id.* at *2. Nevertheless, the court ruled that the minor child's blood level did not constitute imminent harm as a matter of law. (It bears noting that plaintiffs in this case specifically allege "imminent harm" as a basis for their own injunction request. Complaint ¶¶ 11 & 31 (alleging "imminent serious health risk" to named plaintiffs) and Application for Preliminary Injunction ¶¶ 2 & 5 (plaintiffs are "at imminent risk of further harm").The *Kowalczyk* court set forth two related explanations for its conclusion. First, "lead poisoning from environmental sources is not a time-limited incident or event. Rather it is a disease process that usually takes a period of time to manifest itself." *Id.* at *5 (citing *Morris v. Ingram,* NNH CV09 5027918, 2010 Ct. Sup. 8260 (Lager, J.)). Dr. Rosenthal agreed with those propositions. *Hearing Tr.* at 131. Second, the court stated that the lack of imminent risk is clear:

> from the literature cited in case law, see, e.g. as well as from the statutory time frames relating to the duties of the local health district to fully abate the environmental sources of the lead, which stretch out over a period of many weeks. See Reg. Ct. State Ag. §§ 19a–111–1 et seq. The risk of harm occurs when a person ingests particles of lead from dust, dirt, liquid or vapor, sometimes in minute amounts, that build up in the blood stream to the point of toxicity. See also, State of Connecticut, Department of Public Health publication, explaining the cause and effect of lead poisoning to parents: http:/ /www.ct.gov/dph/lib/dph/environmental_ health/lead/pdf/parents.pdf.
>
> *The fact that the Connecticut public health regulations do not make it mandatory that the affected child be immediately removed from the home, but rather prescribe a series of remedial measures that may take place over a period of time, compel a finding that the harm presented by lead poisoning, while substantial, is not one that can fairly be described as imminent.* Indeed the language of § 19a–111–5, distinguishing an "imminent health hazard" from the ordinary processes and time tables to be utilized during a lead abatement project, is further support for the proposition that

> elevated blood lead levels do not meet the criterion for imminent harm . . .

Kowalczyk at *5 (emphasis added).

Indeed, if the Court would decide that the named plaintiffs face imminent or irreparable harm on the basis of the evidence presented, then it would essentially be deciding that children with the same blood levels of lead face such harm throughout Connecticut, even though the State of Connecticut's legislature has concluded otherwise. This Court would further be concluding, on the most flimsy evidentiary basis, that not only the City of New Haven but *ipso facto* the State of Connecticut and all the local health departments in towns and cities across the state are failing to address that harm. This Court should not reach such a broad, and in fact revolutionary, conclusion on the basis of the June 7 injunction hearing in this case.

b. The Court Should Not Have Allowed Dr. Rosenthal to Testify as an Expert and Her Testimony does Not Merit Significant Weight

Defendants must reiterate that Dr. Rosenthal should not have been allowed to testify as an expert witness because, contrary to the Court's decision at the June 7 hearing, plaintiffs did not comply with section 13-4 of the Practice Book. Section 13-4 of the Practice Book allows a healthcare provider who has rendered care or treatment to plaintiff to testify as to opinions only for which "fair notice" is given. Plaintiffs' counsel did not comply with the fair notice requirement because they concealed their intention of calling a medical expert witness.

The transcript of the pretrial conference shows without dispute that, contrary to the Court's recollection at the injunction hearing, plaintiffs' counsel never informed the Court or opposing counsel of their intent to call a medical expert, even though it was Attorney Marx who had insisted on timely witness disclosure. Attorney Marx was the first to raise the issue of

witnesses at the pretrial conference. *See* Exhibit 14 at 4. The Court agreed that "I wanted to make sure that we were all on the same page and people weren't gonna be surprised and say, like, we can't go forward because we're surprised in that regard." *Id.* The Court then inquired about additional fact witnesses; Attorney Marx said she intended to call the two parents briefly and then described the testimony she intended to introduce. *Id.* at 7-8. Defense counsel suggested "some sort of anticipated schedule," to which Attorney Marx replied that she did not have their "order worked out." *Id.* at 11. Attorney Marx then listed her specific witnesses in order, with "Dr. Kennedy [defendants' Health Director] third," and said she anticipated finishing by lunch. *Id.* at 13. She made no mention of a medical expert. Attorney Marx then asked defense counsel to identify their own witnesses; defense counsel said that issue was still being considered (which was true; defendants had sent out one subpoena but had not conferred with that potential witness and did not yet know if she would be called). *Id.* at 14. After colloquy about legal issues and briefing, Attorney Marx said the following: "*Your Honor, if I may just so we can . . . prepare properly, given that we just shared our witnesses,* can we have a date by which we can be notified of the defendants' witness so that we have a sense of how their – the timing of their case will proceed?" *Id.* at 29 (emphasis added). Defense counsel promised to provide that information by Wednesday, two days later, *id.* at 30, and did so.

The statement by plaintiffs' counsel that she had "shared our witnesses" was untrue, and in the most important sense. On Thursday at about 5 p.m., plaintiffs informed defense counsel that they had subpoenaed one witness -- Evelise Riveiro (who had not been mentioned at the pretrial, either). And then on Thursday afternoon, while preparing for the hearing, defense counsel learned that employees of the City's Health Department had been talking a day or two

earlier about plaintiffs spreading the word of an unidentified "surprise bombshell" witness they would introduce at the hearing, obviously a reference to plaintiffs' medical expert, Dr. Rosenthal.

This record makes it clear that plaintiffs did not provide fair notice of Dr. Rosenthal's testimony, in any way that is meaningful under the Practice Book. The purpose of that section "is to assist the parties in the preparation of their cases, and to eliminate unfair surprise . . . ." *Wyszomierski v. Siracusa*, 290 Conn. 225, 234 (2009). "Fair notice" means that plaintiffs – who first raised the issue of disclosing witnesses in order to prepare for the hearing – should have informed defense counsel of an expert medical witness either at the pretrial conference, or the day or two following. The whole point of the pretrial conference was to avoid such unfair surprise, which is exactly what was allowed to happen. Plaintiffs obviously knew by midweek (and probably much earlier) that they would call an expert medical witness, and yet they deliberately chose not to inform opposing counsel. They did so in the misguided belief that the Practice Book did not require them to provide *any* notice, so that they could get away with this tactic. The Court should reconsider its denial of defendants' motion to preclude this "expert" testimony, based on the lack of fair notice in compliance with Practice Book section 13-4.

Second, the testimony of Dr. Rosenthal should be precluded under the same section of the Practice Book because, as she admitted, she did not "render care or treatment" to either plaintiff. Plaintiffs' counsel stated that Dr. Rosenthal *"does not treat these two patients"*; the treating physician is Dr. Baum, who apparently was "not available" for the hearing. *Hearing Tr.* at 110-111.

2. *Even If There Is Irreparable Harm, Plaintiffs Have Not Shown That Such Harm Would Be Prevented by an Injunction*

In order to obtain an injunction, plaintiffs need to prove not only irreparable harm, but they must also prove that the harm for which they seek remedy was caused by the defendants' conduct. Without such proof, there is no basis for concluding that an injunction is required in order to prevent irreparable harm. *Karls v. Alexandra Realty Corporation,* 179 Conn. 390 (1980). As the Connecticut Supreme Court explained in *Karls*, "The plaintiff seeking injunctive relief bears the burden of proving facts which will establish irreparable harm *as a result of that violation. . . .* " *Id.* at 401; *see also Morris v. Ingram*, 2010 WL 1817815 (New Haven Apr. 6, 2010) (Lager, J.) (Exhibit 15) (in absence of expert testimony on causation, mere fact that child's blood lead level was elevated "does not establish the source of his exposure. Lead is prevalent in the environment. . . . Although lead based paint is undoubtedly a potential source of exposure, many other sources of lead, including contaminated soil, drinking water, food and commercial products have been found to "make a notable contribution" to childhood lead exposure). *Id.* at *4. Again, Dr. Rosenthal agreed that lead poisoning is "a disease process that usually takes a period of time to manifest itself." *Id.* at 131. She agreed that the mere fact that a child has level of lead in his or her blood does not provide information on the source of that lead. *Id.* at 131-32. She agreed that there are other potential sources of lead in a child's blood besides paint, including soil, drinking water, food and commercial products. *Id.* at 134.

The testimony in this case confirmed that point clearly; even plaintiffs concede that lead in blood often results from causes other than paint. Plaintiffs' Complaint is replete with unsupported allegations as to the existence of toxic levels of lead paint in their homes. In fact, however, it was within their power to offer evidence that either Nyriel or Sara's blood lead level

resulted from toxic levels of lead paint on the premises. They could, for example, have obtained limited private testing (which, if it found a toxic level of paint, would trigger the City's obligation to inspect, regardless of blood lead level), or they could have called an expert witness on the causation of lead in blood. They could have taken steps to verify that there were no other sources of lead exposure in the home, or in the school that Sara attends every day, which could have been eliminated. They did not do so, and they have not met their burden of showing that the injunctive relief they seek would address the supposedly "irreparable harm" of lead in their blood.

C. *Plaintiffs Have Not Shown they will Likely Prevail on the Merits*

Plaintiffs have not demonstrated by any probative evidence that they will likely prevail in establishing that the City and its officials, by changing practice and scheduling comprehensive lead home inspections when provided notice of a child's blood lead level of 20 μg/dl rather than 5μg/dl, have violated the law, and their request for an injunction should be denied on this basis alone.[4]

1. Plaintiffs Have Not Shown that the City Ordinance Defines "Lead Poisoning" To Include Their Condition

Section 16-61 of the City of New Haven Ordinance contains definitions related to lead paint, and these definitions form the basis for its Health Department's actions. The definition of "lead poisoning" under the law of the City of New Haven is as follows:

> *Lead poisoning* shall mean a blood lead concentration equal to or greater than twenty (20) micrograms per deciliter of whole blood,

[4] The Complaint includes four causes of action based on City law – violation of the City's ordinance, two counts of "violation of separation of powers," and "deprivation of notice and comment." Plaintiffs introduced no meaningful evidence in support of the latter three of those causes of action and appeared to recognize that the central question for the Court is whether the City has lawfully interpreted its own definition of "lead poisoning," which would go to the first cause of action.

> or any other abnormal body burden of lead as defined by the Centers for Disease Control and Prevention.

City of New Haven Ordinance 16-61(g). Under section 16-46 of those ordinances:

> Where the director of public health . . . finds any of the following he shall issue an order to the owner of the premises or the occupant of any dwelling unit therein who possesses hazardous personal property to eliminate the hazard . . . :
>
> > (2) The presence of lead-based paint in the dwelling unit of a child with lead poisoning, as defined in section 16-61 in the dwelling unit of a child whose blood lead is twenty five (25) micrograms or more per one (1) deciliter of whole blood, or any other dwelling unit in the same building (including all staircases, hallways and porches); . . .

Plaintiffs in this case argue that the City must schedule comprehensive lead home inspections immediately upon receipt of blood tests showing lead levels of 5 μg/dl or higher, because such a level, in their view, constitutes "lead poisoning" under the City's law. This is incorrect, particularly in light of the "basic tenet of statutory construction that [w]e construe a statute as a whole and read its subsections concurrently in order to reach a reasonable overall interpretation." *State v. Fernando A.,* 294 Conn. 1, 38 (2009).

Dr. Byron Kennedy testified that as the City's Health Director, he is familiar with State and City law on lead paint, lead prevention and lead poisoning, and that he specifically understands the City's definition of "lead poisoning." *Hearing Tr.* at 257-58. Dr. Kennedy has an MD, PhD and a master's in public health. *Hearing Tr.* at 209. He also is a practicing physician whose practice includes treatment of children at clinics. *Id.* at 257. (Unlike Dr. Rosenthal, Dr. Kennedy has published on the issue of lead in children's blood. *Id.* at 209.) Dr. Kennedy is in charge of the City's lead prevention programs. *Id.* at 257. Dr. Kennedy testified that the ordinance's language "abnormal body burden of lead . . . refers to tissue, and tissue can include bone, it can include teeth, it can include kidneys, it can include the brain, it can include . . . other

parts of the body." *Id.* at 259. Dr. Kennedy explained that "abnormal body burden of lead" does not mean blood level only. *Id.* at 260. When he and his Health Department apply the City's law, therefore, they understand the first half of the statutory definition of lead poisoning to refer to blood, while the second half refers to things other than the blood (which is listed in the first half). *Id.* at 261. This is clearly a reasonable, and in fact the most reasonable, reading of the ordinance. After all, if blood levels are one kind of body burden of lead, then the phrase "any *other* abnormal body burden of lead" surely refers to things other than blood. And that is what Dr. Kennedy testified as well. Under questioning by the Court, Dr. Kennedy reiterated that the second half of the definition, in referring to "abnormal body burden," is a reference to tissues, bone, teeth, kidneys, and other parts of the body. *Id.* at 261-62. And Dr. Kennedy's department does not routinely receive testing information on such parts of the body. *Id.* at 262. Therefore, the City bases its action on reports of blood levels of lead, which is provided to the City under State of Connecticut requirements. *Id.* at 263. *See also* Defendants' Hearing Ex. E (State of Connecticut provides guidance to local health departments regarding certain state regulatory requirements "for responding to childhood *lead poisoning* cases, i.e., children diagnosed with a confirmed blood lead level of 20 ug/dl or more or two confirmed blood lead levels between 15-19 ug/dl taken 90 days apart).

It should be noted that while plaintiffs argue that they have "lead poisoning" under the City ordinance, their own Complaint has not even managed to allege this to be the case. In Paragraph 53 of the complaint, plaintiffs recognize that the definition of "lead poisoning" under the City ordinance is: (1) an EBLL of 20 μg/dl; or (2) "any other abnormal body burden of lead as defined by the Centers for Disease Control and Prevention." But then in the very next

paragraph, paragraph 54, the Complaint alleges that "Since 2012, the Centers for Disease Control and Prevention have defined an *elevated blood level* as a single blood lead test at or above the reference range value of 5, . . . " (emphasis added). This quick switch in plaintiffs' terminology is important; they understandably cannot allege that the CDC defines an "abnormal body burden" (the term in the City ordinance) as 5 μg/dl. Elevated blood level and other abnormal body burden are different concepts, in two different parts of the City's definition of "lead poisoning," and yet the allegations in the Complaint conflate them, as if they were the same. The fact is that plaintiffs do not have "lead poisoning" as defined by the ordinances of the City of New Haven because: (1) their blood lead levels have not reached 20 μg/dl; and (2) as the Complaint essentially recognizes, plaintiffs have levels of lead in their blood, but they certainly have not met their burden of proof to establish "any other abnormal body burden of lead as defined by the Centers for Disease Control and Prevention."

The testimony of plaintiff's "expert," Dr. Rosenthal, provided no substance for the view that the plaintiffs have "lead poisoning" under the City ordinance. She testified that, in her clinical practice, *she* defines abnormal body burden of lead under the CDC's meaning as "the blood level," and she added that "we worry about the level of five or higher." *Id.* at 110. The fact that Dr. Rosenthal and her clinic worry about lead in children's blood is no doubt important and commendable, but it does not mean that a level of "five or higher" constitutes "any other abnormal body burden of lead as defined by the" CDC. She also admitted that there are other ways to assess lead in the body, including teeth, bone and brains. *Id.* at 126. Importantly, Dr. Rosenthal admitted that the CDC itself is <u>not</u> her source for such opinions, *id.* at 127-28 – even though the City ordinance, in its use of the term "any other abnormal body burden of lead,"

specifically refers to the CDC. And she freely admitted – in fact she interrupted defense counsel to state – that there is no exact CDC reference defining that term. *Id.* at 128. In short, the testimony of Dr. Rosenthal cannot possibly meet plaintiffs' burden of establishing that the City's definition of "lead poisoning" means what they say it does, or that the City has violated its law, or that plaintiffs are likely to prevail on the merits of this case. Plaintiffs bear the burden of proving that they have "lead poisoning" as defined by the City ordinance, but they have failed to do so.

2. The Evidence Shows that The City Revised its Practice Under Its Ordinances, as It Had the Authority to Do In Enforcing its Law

The record is undisputed that, near the end of 2018, the City revised its practice in relation to comprehensive lead home inspections. This was addressed in the testimony of Jomika Bogan, who has been a lead inspector and risk assessor for the City over the past nine years. Ms. Bogan testified that when her office receives notification of a child with a blood lead level of 5 μg/dl or greater, they open a case for that child. *Hearing Tr.* at 150-51. Ms. Bogan explained that during the recent time period, if her office received a notice of a child with a blood lead level of 5 μg/dl or greater, it would reach out to the family and try to do a lead inspection. *Id.* at 152. This was done under the instructions of her supervisor, Paul Kowalski. *Id.* at 154. Then, at the end of November 2018, Mr. Kowalski instructed the inspectors to "do lead inspections when a child is technically lead poisoned." *Id.* at 155. (Ms. Bogan testified accurately that, to her understanding, this definition of "lead poisoning" is the same under State and City law. *Id.* at 165.) "So none of that has changed. We were just directed to change our practices." *Id.*

Since that point in time, children whose levels were 5-19 were sent reminder letters about further blood testing, along with educational and informational material, *Hearing Tr.* at 156, 178,

which is consistent with the CDC's recommendations. *See* Defendants' Hearing Ex. A. Like Dr. Kennedy, Ms. Bogan testified that her office receives no reports as to any "abnormal body burden" and that it only receives blood test results. *Hearing Tr.* at 195. She also explained that the State of Connecticut does not require her office to receive or obtain any reports about "abnormal body burden of lead"; her office does not receive reports of lead in children's tissues, bones or other body parts, but only reports of levels in blood. *Id.*

Sherine Drummond testified that she is an epidemiologist and case manager with the State of Connecticut Department of Public Health, for the lead and radon "Healthy Homes Program." *Hearing Tr.* at 223-24. She is responsible for answering questions from the public about lead and lead poisoning. Her region includes New Haven, and her duties entail enforcement of Connecticut law on lead paint in homes, and interacting with local health directors to make sure they follow State law and regulations, and to answer their questions about case management. *Id.* at 224-25. She understands the definition of "elevated blood level" of lead ("EBLL") under State regulations to mean 20 μg/dl or higher. *Id.* at 226. At levels lower than 20 μg/dl, her department requires local health departments to send out educational materials and reminder letters about further testing of the children's blood, to see if the lead level is increasing or decreasing. *Id.* at 226-27. Home visits including without limitation comprehensive lead home inspections are not required at levels lower than 20 μg/dl. *Id.* at 227.

Dr. Kennedy then testified about the City's basis for changing its practice and his understanding of what City and State law require of his department. When Dr. Kennedy began his tenure as Health Director for the City, the practice was to schedule comprehensive lead home inspections when the child's blood level was 10 μg/dl or greater. From time to time, this practice

has evolved and changed; at some points in time, the City was scheduling home inspections at levels of 20 μg/dl and above, at some points in time at 15 μg/dl, and at some points in time at 10 μg/dl. *Id.* at 264. These changes were not, and are not required to be, in lockstep with CDC reference levels. *Id.* at 264-65. Since November 2018, the City has been clarifying its practices as to blood lead levels, in part under the advice of counsel, and including the convening of an Advisory Board as required by City ordinance. *Id.* at 266-67; *see* City of New Haven Ordinance 16-67 (Mayor shall appoint lead poisoning advisory committee with board of aldermen's approval, to advance development and adoption of policies, programs and procedures for effective enforcement, promotion and coordination of lead poisoning prevention and abatement efforts, involving healthcare providers, Health Department, Housing Department, and others). In fact, the City's goal is to review its legal requirements and review its practices to make sure it is complying with the law. *Id.* at 267-68. The City also has been attempting to deal with lack of resources and staff necessary to conduct the time-consuming comprehensive lead home inspections. *Id.* at 268-70.

Dr. Kennedy agreed that there has been a "change in practice" at the Health Department since November or December 2018, by which the Department was no longer scheduling comprehensive lead home inspections for children whose blood lead level was 5-19 μg/dl. *Id.* at 211-12. This change in practice resulted from discussions between him, his Environmental Health Director (Paul Kowalski) and others in the administration. *Id.* at 212. Dr. Kennedy made it clear that this was a "change in practice" and not a "change in policy." *Id.* at 213. Dr. Kennedy explained in detail why the City's definition of "lead poisoning," in using the phrase "any other abnormal body burden of lead as defined by the Centers for Disease Control and Prevention,"

does not refer to blood levels, which already are covered by the same definition and which are specific to the level of 20 μg/dl:

> I think with regards to total body burden, you know, of lead, you know, that has evolved and our ability to sort of measure that accurately, that is evolving as we speak. You know, and so I think, and, again, this is just my opinion, you know, part of the reason why you have that component in there because it leaves open the possibility that in the future we may have better measures that can actually maybe identify abnormal body burden besides just the current one that's fairly convenient and fairly inexpensive and fairly noninvasive, which is the blood test.
>
> As an example, with the -- you know, with the bone, you can certainly do a biopsy but there are other, you know, noninvasive ways for measuring, if you will, the lead content, and one that includes, you know, XRF, which is x-ray fluorescence. And that's very similar to the device that we actually use when we measure the lead levels in paint, you know, when we do the inspections. You know, so that can be applied, if you will, you know, to a person's leg and you can get a measure, get a reading. Obviously, that's not, if you will, for prime time right now, but that's being routinely in clinical practice. But it's not to sort of say that you may have that in the future.

Id. at 262-63. As Dr. Kennedy explained further:

> I think to say that the blood lead level represents an abnormal body, I -- your -- it's like -- it's confusing, you know, apples and oranges because you're talking about blood, and that's the only thing that you're measuring, so that's really the only thing that you can actually talk about at that level using that -- those units. You can't refer to that as another part of the body because there's different measures, there's different instruments for that. . . . [The CDC] actually will identify, maybe, the blood, and they'll talk about those levels, and then they will also talk about, you know, other burdens in the body, including the ones that were mentioned earlier today. . . .
>
> . . . our action level that we do with the city ordinance, there's two components. There's the blood specific component and then there is another component that's not blood, which I think allows for, you know, what might actually happen in terms of research. We

> have a lot of tests, as I mentioned earlier, that are going on right now. And with those different tests that are going on right now, they, as of yet, are not part of clinical routine practice, that is not to say that they may not be in the future.

Id. at 283-85. And Dr. Kennedy stated the following, as to the City's intentions in relation to children with lead in blood:

> In my opinion, I think that's the history of this department and for the city, you know, wanting to do everything that it could to actually protect, maybe, children in this community and families. And I think 1 wanting to be more aggressive with regards to our action level and what we actually did with the capacity that we actually had at the time. And so I think, you know, as you looked at, you know, different levels and what you actually had to do at the state level, I think we've tried to be proactive, we knew that was more proactive than what we were required to do because we wanted to do what was in the best interest of the families in this community.
>
> And also I think some of that included the resource that we were getting along the way. I mean, we were the first community, you know, in the State of Connecticut, I believe, that received HUD funding, you know, from -- from the feds, and that was significant in terms of us being able to have a huge impact on what was going on in this community. To the extent that we were able to, just from what -- I think it was, what, from 20 -- from 2002 to the most recent year, 2018, we've had a reduction by more than 76% of 20 reducing the level at that ten level. It's kind of hard to sort of compare it – . . . the success that we've actually had in reducing the level and using the 20 indicator of ten micrograms, you know, per deciliter, you know, we now have about a hundred of those as opposed to in 20 -- or 2002, we had, you know, close to four to 500. So that's a 76% maybe reduction, and so I think that reflects the success of our department because we've been very proactive.

Id. at 276-78. In addition, both Ms. Bogan and Dr. Kennedy explained that when the City chooses to conduct immediate comprehensive lead home inspections whenever there is a blood lead level of 5 μg/dl or greater, that has detrimental consequences for the City's lead prevention program. Ms. Bogan testified that when the Department's practice had changed, to schedule

comprehensive lead home inspections for any children with a level of 5 μg/dl or higher, her workload changed "drastically." *Id.* at 198. Her caseload approximately doubled, from about 60 to 120. *Id.* This meant she had to "triage" her cases, trying to give priority to the children with the highest levels. *Id.* (She also explained that the number of inspectors in her unit had decreased from five to two. *Id.* at 199.) Each home inspection takes her about three to five hours. *Id.* at 200. She needs to complete a 15-page epidemiological survey that entails questions about the child's behavior, other lead hazards in the home, and sampling or water, soil, paint. *Id.* at 200. She assesses whether, for example, the child habitually puts toys in her mouth. *Id.* at 200. Sherine Drummond of the Connecticut Department of Health testified that the amount of funding and resources that a local health department has plays a role in determining what measures they can take; for example, there had been a large grant that allowed those departments to conduct more home visits and primary prevention activity. *Id.* at 232. She testified that the City of New Haven has undergone a decrease in its funding for lead inspection and related programs. *Id.* at 243-44. And Dr. Kennedy stated the following about the difficulties faced by a local health department that is trying to comply with the law, and balance its resources with protection of children:

> if we talk about, you know, just removing, you know, all the lead in all the properties in New Haven, which is an old community because it's New England, than that's gonna be a lot, and we can do that, but, you know, some of our estimates that we've actually 1 looked at, that's gonna be over 100 million. So I do say that when we're talking about what am I comfortable with, I'm comfortable with that we should no lead at all, you know, that any child should be exposed to ever. On the other hand, I would like to sort of, you know, submit, you know, that, as an agency, and when we're thinking about as a community, and with the resources that we actually have, what's practical for us to do, you know, given the certain levels. . . . I would also say -- I would add that, you know, we know that there's other environmental exposures, including tobacco, including radiation. And, for those two, there's no safe

> level as well. And, yet, we've, you know, from a public health practice and an agency, and -- and what we try to do with the resources we have in the community, then we have limits in terms of what we can actually do despite the fact that there is no safe level.

Id. at 279-80.

What Dr. Kennedy is saying here is that he, as the City's Health Director, has discretion to change practice in relation to how his department enforces the City's law. Extensive case law from this State's court show that he is correct in that assertion. It is fundamental that plaintiff has the burden of proving that the City, on the facts before the Court, acted contrary to law and in abuse of its discretion. *O'Connor v. City of Waterbury*, 286 Conn. 732, 742 (2008). "In challenging [a municipal] administrative agency action, the plaintiff has the burden of proof." *Samperi v. Inland Wetlands Agency of City of W. Haven*, 226 Conn. 579, 587 (1993). The actions of a local government should be upheld if the evidence "affords a substantial basis of fact from which the fact in issue can be reasonably inferred." *Samperi v. Inland Wetlands Agency of City of W. Haven*, 226 Conn. 579, 588 (1993).

In this instance, the city's power to establish and control its own lead paint inspection and abatement policies falls under its home rule municipal police power and should be given broad construction. A home rule city's police power, conferred upon the city by the state legislature is broad. "There is no doubt that the town has a right to [establish regulations] pursuant to its police power, in the interest of protecting the public safety or the welfare of its inhabitants." *Blue Sky Bar, Inc. v. Town of Stratford,* 203 Conn. 14, 22 (1987). Exercises of municipal police powers are given judicial deference. "Whether present conditions require the degree of regulation imposed by [a city ordinance] is a matter for the judgment of the legislative body of the city.

Courts can interfere only in those extreme cases where the action taken is unreasonable, discriminatory or arbitrary." *Connecticut Theatrical Corp. v. City of New Britain,* 147 Conn. 546, 552 (1960). Connecticut law enables cities to "[d]efine, prohibit and abate within the municipality all nuisances and causes thereof, and all things detrimental to the health, morals, safety, convenience and welfare of its inhabitants and cause the abatement of any nuisance at the expense of the owner or owners of the premises on which such nuisance exists;" C. G. S. § 7-148(c)(7)(E)); and "[p]rovide for the health of the inhabitants of the municipality and do all things necessary or desirable to secure and promote the public health;" C. G. S. § 7-148(c)(7)(H)(xi). Those cities have the power to properly account for local conditions in establishing their own regulations. "Courts will not substitute their judgment for the legislative judgment when these considerations are fairly debatable. They will regard their validity, their necessity, and their wisdom from the standpoint of existing conditions and present times." *State v. Hillman*, 110 Conn. 92 (1929). "[T]he scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." *Id.* "The limit of the exercise of the police power is necessarily flexible." *Clark v. Town Council of Town of W. Hartford*, 145 Conn. 476, 482–83 (1958). "It has to be considered in the light of the times and the prevailing conditions." *State v. Gordon,* 143 Conn. 698, 703 (1956). "The day-to-day decision-making regarding when and how to direct town resources in furtherance of [municipal regulatory duties] necessarily is left to the judgment and discretion of [agency] officials and employees." *Northrup v. Witkowski,* 175 Conn. App. 223, 237 (2017). The "Court's inquiry of municipal decisions should be "limited to whether the defendants acted in accordance with the statutory procedure . . . and whether . . . defendants were guilty of any form

of misconduct." *Candlewood Hills Tax Dist. v. Media*, 143 Conn. App. 230, 239-240 (2013). "When municipal authorities *are* acting within the limits of the formal powers conferred upon them and in due form of law, the right of courts to supervise, review or restrain them is necessarily exceedingly limited." *Id.* at 238.

For these reasons, Connecticut courts have applied a presumption that injunctive relief will not be granted against a city or local government where its discretionary actions appear to comply with the governing law. In *Hopkins v. Hamden Bd. Of Ed.*, 29 Conn. Supp. 397 (1971), the court declined to issue an injunction ordering a local school board to change curriculum policies, despite plaintiff's allegations that the board had violated governing statutes. The court was unable to "find without doubt that any . . . statutory right has been violated," given that the statutes in question were best construed to permit some discretion in preparing curricula. The court was therefore "unable to predict with any reasonable certainty that the plaintiffs will prevail finally on the merits" and thus denied the injunction. *Id.* at 417. In *Rocco v. City of Waterbury*, 2005 WL 2649757 at *3 (Waterbury July 12, 2005) (Exhibit 16), the court declined to issue a mandatory injunction where its ability to evaluate plaintiff's likelihood of success on the merits depended on statutory intent. Plaintiff requested injunctive relief against the city that would have offset his retirement benefits, based on his workers' compensation benefits. The claim was predicated on an allegation that the city violated a provision of the charter and a collective bargaining agreement. The court found that "In this case, the evidence is insufficient to find that the plaintiff will probably prevail on the merits because there was insufficient evidence before the court with respect to the intent of the negotiators to the 1996 collective bargaining agreement. Therefore, the application for mandatory injunction is denied." *Accord, Bugryn v.*

City of Bristol, 63 Conn. App. 98 (2001) (declining to grant injunction where evidence failed to show that city had violated statute, without need to address ordinary four-part injunction test).

The City of New Haven has properly interpreted its own ordinance and has revised its practice under that ordinance over time. The City's judgment should not be overruled by this Court, particularly not in the context of a preliminary injunction application, and particularly where plaintiffs have submitted essentially no proof that the law must mean what *they* say it means.

D. *Plaintiffs Have Not Shown that The Balance of Equities Is in Their Favor*

Plaintiffs have not demonstrated by any evidence that the balance of equities tips in their favor. Plaintiffs are children with measured levels of lead in their blood. No one denies the legitimacy of their families' concern. But the laws of the State of Connecticut and City of New Haven cannot prevent all possible harm to all children who have some level of lead in their bloodstream; preventing all harm is something that government cannot do. If the court issues an injunction requiring the City of New Haven to conduct comprehensive lead inspections and order abatement of properties for every child under 6 who has an EBLL of 5 μg/dl and greater, as plaintiffs are requesting, then the City of New Haven's lead-paint protection efforts may well suffer on the whole, and more children may be harmed – and most likely, those with higher blood lead levels, who will be put in the same line as children with far lower levels. That is the "balance of equities" here.

Moreover, the equities in this case include the rights of two sets of absent groups: the homeowners who would be required to abate their premises, *see Hearing Tr.* at 270-71, and the Elm City Housing Authority, which has the direct and primary obligation for inspections of

federally subsidized and Section 8 homes; that burden does not fall on a local health department under federal law. *Id.* at 244-45, 253, 271-72; *see also* Defendants' Hearing Ex. F. Without those groups as parties, as they will be when this case proceeds, the Court should not find that the equities weigh in plaintiffs' favor as opposed to the defendants and all others with an interest in this case, and it should deny plaintiffs' application for a temporary injunction as to the City's compliance with its own ordinance.

III. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF PROOF AS TO A VIOLATION OF CONNECTICUT LAW

Plaintiffs have requested an injunction that would require the City to make specific statements about federal law in its notifications to families. That request merits little argument. The State law in question is section 19a-110 of the Connecticut General Statutes. It states, in pertinent part, as follows:

> (d) The director of health of the town, city, borough or district shall provide or cause to be provided, to the parent or guardian of a child who is (1) known to have a confirmed venous blood lead level of five micrograms per deciliter of blood or more, or (2) the subject of a report by an institution or clinical laboratory, pursuant to subsection (a) of this section, with information describing the dangers of lead poisoning, precautions to reduce the risk of lead poisoning, information about potential eligibility for services for children from birth to three years of age pursuant to sections 17a-248 to 17a-248g, inclusive, and laws and regulations concerning lead abatement. The director of health need only provide, or cause to be provided, such information to such parent or guardian on one occasion after receipt of an initial report of an abnormal blood lead level as described in subdivisions (1) and (2) of this subsection. *Such information shall be developed by the Department of Public Health and provided to each local and district director of health . . .*

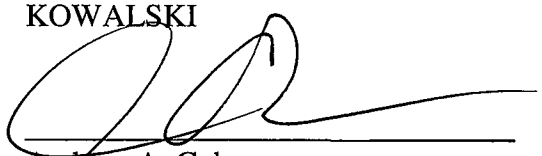
(emphasis added). The statute itself demonstrates, in the italicized language, that the information provided is within the discretion of the local health department. Plaintiffs have offered no

evidence that the information provided by the City of New Haven Health Department either fails to meet this statute's requirement or that it deviates from this statute's requirement. Moreover, they have provided no proof whatsoever that, even assuming the City has not provided required materials, its actions are causing the plaintiffs irreparable harm. Therefore, no injunction should be issued as to this law.

CONCLUSION

For the reasons set forth above, the Court should deny the plaintiffs' application for temporary injunction.

DEFENDANTS
CITY OF NEW HAVEN, TONI HARP, BYRON KENNEDY & PAUL KOWALSKI

By: 

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CERTIFICATION

This is to certify that a copy of the foregoing was electronically mailed on this 13th day of June 2019 to all counsel and pro se parties of record as follows:

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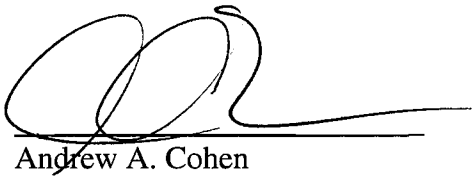
By: 

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